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PARTICULAR CONTRACTS

J. Denson Smith*

Only a few significant cases within this classification were decided during the last term. Most of them are in the process of being noted in this Review. They include *United States Fidelity & Guaranty Co. v. Dixie Parking Service, Inc.*,¹ in which the court considered the responsibility of a compensated depositary with respect to property left in an automobile accepted for storage in a parking garage; *Media Production Consultants, Inc. v. Mercedes-Benz of North America, Inc.*,² an interesting and important case concerned with the right of a purchaser of a foreign-built car from a local dealer to recover against the American distributor; *Fraser v. Ameling*,³ which dealt with the obligation of the purchaser of a home to discover the full extent of termite damage where there is some known evidence of infestation; and *Gist v. Donaldson Ford Co.*,⁴ which involved a delicate question concerning the formation of a contract between an automobile dealer and a prospective purchaser.

In addition to the mentioned cases, an interesting problem of subrogation was presented in the case of *Jacobs v. Sikes*.⁵ It appears that a brother, in pursuit of his own convenience, unknown to his sister, transferred to her by way of a simulated cash sale a certain tract of land. After learning of this, the sister, in a letter to her brother, agreed to transfer the property back to him when he was "ready." Subsequently she refused to do this, apparently on the theory that she had paid for the property. In support of this position she relied on a claim that she had paid certain taxes on the property and also the fact that she had paid off a mortgage amounting to about \$2,000. The majority of the court, with one judge dissenting, held that the letter written by the sister to her brother constituted a counter letter which established that the sale was a simulation, and that the subsequent payments made by her would not change this fact. To the contention that the sister was entitled to legal

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1. 262 La. 45, 262 So.2d 365 (1972).

2. 260 La. 80, 262 So.2d 377 (1972).

3. 259 So.2d 95 (La. App. 4th Cir. 1972).

4. 262 So.2d 145 (La. App. 3d Cir. 1972).

5. 253 So.2d 112 (La. App. 2d Cir. 1971).

subrogation by virtue of paying off the mortgage, the court refused to apply Civil Code article 2161.2 on the ground that, since no "consideration" had been given for the transfer, the sister was not a purchaser and was not entitled to legal subrogation. Pretermittting the effect to be given to the sister's letter, it does appear that she was either entitled to legal subrogation on the ground stated by the dissenting judge, i.e., that having paid taxes on the property she was a creditor when she paid off the mortgage and was, therefore, entitled to legal subrogation under article 2161.1, or that, in any event, she was entitled to recover the amount she had paid in satisfaction of her brother's debt. It is clear that a mere volunteer no way concerned in a debt cannot, by paying it, become legally subrogated.⁶ Granting that the sister was a person no way concerned in the debt (a question not free from doubt) and, therefore, not entitled to legal subrogation, it appears, nevertheless, that the payments made by her were not made by way of gratuity to her brother. If it be granted that she considered herself as paying her brother's debt, then she should have been entitled to recover on the theory of *negotiorum gestio*, which is the underlying basis for the remedy given by the second paragraph of Civil Code article 2134.⁷ If she counted herself as paying her brother's debt in the mistaken belief that she was indebted to him for the property, Civil Code article 2310 would afford a remedy. Finally, if neither *negotiorum gestio* nor the payment of a thing not due could be properly applied, the action *de in rem verso*, based on unjustified enrichment, would appear to have been available to prevent the correlative impoverishment of the sister and the enrichment of the brother. However, the opinion does not make clear just what relief, other than through legal subrogation, the sister was seeking as an alternative to being recognized as owner of the property.

6. LA. CIV. CODE arts. 2134, 2161.

7. See LA. CIV. CODE art. 2299; *Standard Motor Car Co. v. State Farm Mut. Auto. Ins. Co.*, 97 So.2d 435 (La. App. 1st Cir. 1957), and the French authorities therein quoted; also 2 CARBONNIER, DROIT CIVIL, § 211(A)(a): "The payment for another may proceed from a liberal intention and amount to an indirect donation (the payer then has no recourse against the debtor). But it may constitute simply a *gestion d'affaire* if the payer, although rendering service to the debtor, does not intend to enrich him definitively (in this case he has the right to be indemnified in accordance with Article 1375)."